

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|------------------------------------|---|-----------------------------------|
| In the Matter of |) | |
| |) | |
| Birach Broadcasting Corporation |) | File No.: EB-FIELDNER-13-00010859 |
| |) | |
| Owner of Antenna Structure Numbers |) | NAL/Acct. No.: 201432400009 |
| 1222688 and 1222689 |) | FRN: 0003766847 |
| Licensee of Station WWCS |) | Facility ID No.: 5349 |
| Canonsburg, Pennsylvania |) | |

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: June 26, 2014

Released: June 26, 2014

By the District Director, Philadelphia Office, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. We propose a penalty of \$12,000 against Birach Broadcasting Corporation (Birach Broadcasting) for apparently failing to enclose AM Station WWCS's two antenna structures in Canonsburg, Pennsylvania, within effective locked fences. Although Birach Broadcasting was aware that the fences were in a state of disrepair, it failed to confirm that repairs were completed, which resulted in unrestricted public access to the antenna structures for an extended period of time. The damaged fences presented a particular public safety concern because the antenna structures were located in a residential neighborhood. The Enforcement Bureau previously proposed penalties against Birach Broadcasting for apparent fencing violations on two separate occasions. This history of noncompliance with the antenna structure fencing rules warrants a significant increase to our normal penalties. In addition, these apparent violations raise concerns that Birach Broadcasting may have a systemic compliance issue with the antenna structure fencing rules. As a result, we order Birach Broadcasting to submit information regarding the current fencing of its antenna structures and provide a timeline to remediate any current violations.

2. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Birach Broadcasting, owner of antenna structure numbers 1222688 and 1222689 (Antenna Structures) and licensee of Station WWCS in Canonsburg, Pennsylvania, apparently willfully and repeatedly violated Section 73.49 of the Commission's rules (Rules),¹ by failing to enclose the Antenna Structures within an effective locked fence or other enclosure. We conclude that Birach Broadcasting is apparently liable for a forfeiture in the amount of twelve thousand dollars (\$12,000).

II. BACKGROUND

3. On August 22, 2013, an agent of the Enforcement Bureau's Philadelphia Office (Philadelphia Office) conducted an inspection of the Antenna Structures utilized for the Station WWCS two-tower directional antenna array located in a residential neighborhood of Canonsburg, Pennsylvania. At the time of the inspection, the agent observed that each Antenna Structure was surrounded by a wooden fence, but that large sections of each fence had completely fallen onto the ground. The agent also observed that there was no fence around the perimeter of the property and that a significant amount of vegetation had grown over the fallen fencing. These conditions led to unrestricted public access to both Antenna Structures, which had radio frequency potential at their bases.

¹ 47 C.F.R. § 73.49.

4. On September 4, 2013, the Philadelphia Office issued a Notice of Violation (NOV) to Birach Broadcasting for failing to enclose the Antenna Structures within an effective locked fence or other enclosure in violation of Section 73.49 of the Rules.² Birach Broadcasting's *NOV Response* stated that it hired a tower company in July 2013 to repair the fences, but it was not aware that the work was never completed until notified by the FCC agent.³ The *NOV Response* further stated that the fencing repairs were completed just a few days after the FCC inspection by a different tower company.⁴

III. DISCUSSION

5. Section 503(b) of the Communications Act of 1934, as amended (Act), provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁵ Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁶ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁷ and the Commission has so interpreted the term in the Section 503(b) context.⁸ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁹ The term "repeated" means the commission or omission of such act more than once or for more than one day.¹⁰

A. Failure to Enclose the Antenna Structures Within an Effective Locked Fence

6. The evidence in this case is sufficient to establish that Birach Broadcasting violated Section 73.49 of the Rules, which states that "[a]ntenna towers having radio frequency potential at the base . . . must be enclosed within effective locked fences or other enclosures [I]ndividual tower fences need

² See *Birach Broad. Corp.*, Notice of Violation, V201332400040 (Sept. 4, 2013) (on file in EB-FIELDNER-13-00010859) (*NOV*).

³ See Letter from John Trent of the Law Offices of Putbrese, Hunsaker, & Trent, P.C., Birach Broadcasting Corporation (Sept. 13, 2013) (on file in EB-FIELDNER-13-00010859) (*NOV Response*).

⁴ *Id.*

⁵ 47 U.S.C. § 503(b).

⁶ 47 U.S.C. § 312(f)(1).

⁷ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms").

⁸ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

⁹ See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator's repeated signal leakage).

¹⁰ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day." See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, para. 9.

not be installed if the towers are contained within a protective property fence.”¹¹ The Antenna Structures have radio frequency potential at their base and therefore must be enclosed within an effective locked fence. On August 22, 2013, when Station WWCS was in operation, agents from the Philadelphia Office observed that numerous sections of the fences surrounding each of the two Antenna Structures had fallen down, thereby allowing ready access to the bases of the Antenna Structures. The agents also observed that there was no fence around the perimeter of the property. Based on the amount of vegetation growing over the fallen sections of the fences, it was clear that the fences had been in that position for an extended period of time. Indeed, Birach Broadcasting acknowledged in its *NOV Response* that it was aware that the fences needed repair as early as July 2013. Therefore, based on the evidence before us, we find that Birach Broadcasting apparently willfully and repeatedly violated Section 73.49 of the Rules by failing to enclose the Antenna Structures within an effective locked fence.

B. Proposed Forfeiture and Reporting Requirement

7. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for an AM fencing violation is \$7,000.¹² We retain the discretion, however, to issue a higher or lower forfeiture than provided in the *Forfeiture Policy Statement* or to apply alternative or additional sanctions as permitted by statute, subject to the statutory cap.¹³ In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁴

8. Since 2012, the Enforcement Bureau has proposed \$27,000 in penalties against Birach Broadcasting for apparent violations of the antenna structure rules, including for fencing violations.¹⁵ The fact that Birach Broadcasting apparently continues to commit similar violations at its other transmitter sites demonstrates a disregard for the FCC’s authority and raises concerns that it may have a systemic compliance issue with the antenna structure fencing rules.¹⁶ As a result, after applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that a \$5,000 upward forfeiture is warranted and Birach Broadcasting is apparently liable for a forfeiture in the amount of \$12,000.¹⁷

¹¹ 47 C.F.R. § 73.49.

¹² *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹³ 47 C.F.R. § 1.80(b)(8), Note (“The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by statute.”).

¹⁴ 47 U.S.C. § 503(b)(2)(E).

¹⁵ *Birach Broad. Corp.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 468 (Enf. Bur. 2014) (PAID); *Birach Broad. Corp.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 5827 (Enf. Bur. 2012).

¹⁶ Although Birach Broadcasting has not yet paid the forfeiture issued in 2012, the “underlying facts of [the] prior violation . . . show[] a pattern of non-complaint behavior.” See *Forfeiture Policy Statement*, 12 FCC Rcd at 17103, para. 34 (“[U]sing the underlying facts of a prior violation that shows a pattern of non-compliant behavior against a licensee in a subsequent renewal, forfeiture, transfer, or other proceeding does not cause the prejudice that Congress sought to avoid.”); see also *Equity Commc’ns LP*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 8031, 8033, para. 7 (Enf. Bur. 2012) (using the underlying facts from a prior NAL to support an upward adjustment in the proposed forfeiture amount for an AM fencing violation).

¹⁷ See *Telava Wireless, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 3246 (Enf. Bur.

(continued...)

9. In light of Birach Broadcasting's apparent history of non-compliance, we also direct it to submit a written statement signed under penalty of perjury by an officer or director of Birach Broadcasting pursuant to Section 1.16 of the Rules providing: (1) a list of all antenna structures owned by Birach Broadcasting; (2) whether the antenna structures are enclosed within an effective locked fence or other enclosure; and (3) a repair timeline where an antenna structure is not enclosed within an effective locked fence or other enclosure.¹⁸ This statement is in addition to any statement that Birach Broadcasting submits pursuant to paragraph 15 and must be provided to the Philadelphia Office at the address listed in paragraph 12 within thirty (30) calendar days of the release date of this NAL.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Birach Broadcasting Corporation is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twelve thousand dollars (\$12,000) for violations of Section 73.49 of the Commission's rules.¹⁹

11. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Birach Broadcasting Corporation **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

12. **IT IS FURTHER ORDERED** that Birach Broadcasting Corporation **SHALL SUBMIT** a written statement as described in paragraph 9 within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture and Order. This statement must be mailed to Federal Communications Commission, Enforcement Bureau, Northeast Region, Philadelphia Office, 2300 East Lincoln Highway, Langhorne, Pennsylvania 19047 and include the NAL/Acct. No. referenced in the caption. Birach Broadcasting Corporation also shall e-mail the written response to NER-Response@fcc.gov.

13. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Birach Broadcasting Corporation shall also send electronic notification on the date said payment is made to NER-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁰ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

(...continued from previous page) _____

2012) (proposing \$5,000 upward adjustment where repeated violations raised concern of systematic non-compliance with the antenna structure rules); *Telava Wireless, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 3239 (Enf. Bur. 2012) (same).

¹⁸ See *Telava Wireless, Inc.*, 27 FCC Rcd at 3234, para. 7 (ordering antenna structure owner to provide information regarding current compliance).

¹⁹ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, and 73.49.

²⁰ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

14. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²¹ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

15. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Commission's rules.²² Mail the written statement to Federal Communications Commission, Enforcement Bureau, Northeast Region, Philadelphia Office, 2300 East Lincoln Highway, Langhorne, Pennsylvania 19047 and include the NAL/Acct. No. referenced in the caption. Birach Broadcasting Corporation also shall e-mail the written response to NER-Response@fcc.gov.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting principles (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by both Certified Mail, Return Receipt Requested, and first class mail to Birach Broadcasting Corporation at 21700 Northwestern Highway, Suite 1190, Tower 14, Southfield, Michigan 48075.

FEDERAL COMMUNICATIONS COMMISSION

David C. Dombrowski
District Director
Philadelphia Office
Northeast Region
Enforcement Bureau

²¹ See 47 C.F.R. § 1.1914.

²² 47 C.F.R. §§ 1.16, 1.80(f)(3).